

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROSIBEL ZELAYA)	
Claimant)	
)	
VS.)	Docket No. 1,036,145
)	
DOLD FOODS, LLC)	
Self-Insured Respondent)	
)	

ORDER

Claimant requested review of the December 10, 2010 Award by Special Administrative Law Judge (SALJ) Jerry Shelor. The Board heard oral argument on March 18, 2011.

APPEARANCES

Michael J. Wyatt, of Hutchinson, Kansas, appeared for the claimant. Douglas D. Johnson, of Wichita, Kansas, appeared for self-insured respondent (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, respondent conceded that it is no longer disputing compensability of claimant's injuries to her left shoulder, left elbow and right and left knees. The parties also agreed that the only evidence contained within the record reveals that claimant has sustained a 57 percent task loss and a 49.55 percent wage loss. And claimant advised that although the briefs made some reference to low back injuries, her only claim for additional impairment as a result of the work-related accident is to the cervical spine.

ISSUES

The SALJ awarded claimant benefits for four separately scheduled injuries based upon the impairment opinions expressed by Dr. Patrick Do, the treating physician. Accordingly, the Award granted benefits for permanent impairment to the left shoulder

(3%), left elbow (4%), left knee (2%) and right knee (7%). The SALJ specifically found that claimant failed to prove she sustained any permanent impairment to her neck as a result of the motor vehicle accident that occurred on February 20, 2009 while she was on her way to physical therapy for her compensable right leg condition.¹ Thus, she was not entitled to a permanent partial general (work) disability under K.S.A. 44-510e(a) and her recovery was limited to the separately scheduled injuries.

The claimant requests review of the SALJ's ultimate determination of the nature and extent of her disability. Specifically, claimant argues that in addition to her separately scheduled injuries, she also sustained an injury to her neck in the 2009 motor vehicle collision. Claimant contends that the Board should rely on the opinions expressed by Dr. Reiff Brown who found her to have a 13 percent impairment to the left shoulder, 6 percent to the left elbow, 21 percent impairment to the left knee, 2 percent impairment to the right knee as well as a 5 percent each to the cervical and lumbar spine, which when all combined, yield a 31 percent permanent partial disability. Claimant goes on to argue that in addition to her functional impairment, she has also sustained a 53.28 percent permanent partial general (work) disability based upon 57 task loss and a 49.55 wage loss.

Respondent argues that the SALJ's Award should be affirmed, thereby limiting claimant to four scheduled injuries as claimant has wholly failed to establish any permanent injury or impairment related to her neck or low back.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The SALJ's Award accurately succinctly recites the facts and circumstances surrounding claimant's injury, her subsequent treatment and the physicians' ultimate opinions as to resulting impairment. That recitation is hereby adopted and only the pertinent evidence will be referenced as needed to explain the Board's decision.

The most significant dispute in this appeal stems from the nature and extent of claimant's injuries. There is no dispute that she suffered a direct injury to her left shoulder, left elbow and left knee on July 17, 2007. And although initially disputed, respondent now concedes that claimant suffered further injury to her right knee as a natural and probable result of her original injury. Whether and to what extent she sustained further injury to her

¹ Respondent no longer challenges the compensability of this subsequent motor vehicle accident. In the process of receiving treatment for her right knee complaints, claimant was involved in an automobile accident which she alleges caused injury to her neck.

cervical spine as a result of this motor vehicle accident is at the heart of the claimant's appeal.

Dr. Do was claimant's treating physician and began seeing claimant in October, 2007, and ultimately performed surgery to claimant's left knee (December 10, 2007), left shoulder (February 4, 2008) and her left elbow (May 9, 2008). By July 10, 2008, claimant was voicing complaints about her right knee which she attributed to overuse of her left knee complaints. After further examination, and an MRI, Dr. Do performed surgery to claimant's right knee on December 23, 2008.

While receiving treatment for her right knee condition, claimant was involved in a motor vehicle accident on February 20, 2009. Claimant received treatment for her complaints, which included her neck and left knee, at a local emergency room.

Claimant did, however, returned to see Dr. Do on March 5, 2009 but his records do not reflect any mention of neck complaints during the course of this visit, nor did claimant disclose the recent motor vehicle accident. In fact, other than a single complaint of low back pain at her first visit in 2008, his records reflect no other neck or low back complaints during the course of his treatment. He apparently learned of her February 20, 2009 motor vehicle accident through a reference in another physician's office note.

Dr. Do provided the following permanent impairment ratings: 3 percent for the left shoulder; 4 percent for the left elbow; 2 percent for the left knee; and 7 percent to the right knee.² None of these ratings include any impairment as a result of claimant's February 20, 2009 motor vehicle accident.

On September 8, 2009, claimant was examined by Dr. Jeanette Salone, a physiatrist, who noted claimant's then-present complaints of neck and left knee pain due to her motor vehicle accident. Dr. Salone's examination revealed a normal gait, normal range of motion and strength in claimant's shoulders, no irregularities in her spine, but a mild restriction of the range of motion in the neck. Dr. Salone diagnosed a neck strain and offered a course of physical therapy. After that was completed, she released claimant from her care effective February 22, 2010.

Dr. Salone opined that claimant's neck problems were preexisting but aggravated, and not caused by her car accident. Thus, claimant was assigned a 0 percent permanent impairment. Interestingly, Dr. Salone indicated that she does not use the rating

² Do Depo. at 15; American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted. The individual rating to the right knee was rendered on March 6, 2009, after claimant reached MMI following his right knee surgery. The remaining ratings were rendered in August 2008.

methodology prescribed by the *Guides* and even then, does not utilize the DRE's often.³ Rather, she utilizes the *Guides* definition of "impairment"⁴ and because claimant still retains the "ability to perform", she bears no impairment. Although, on cross examination, Dr. Salone conceded that if you use the range of motion results taken during her examination and apply them to the appropriate tables contained within the *Guides*, the resulting impairment would be 5 percent to the whole body for claimant's neck complaints.⁵

In March of 2010, claimant was evaluated by Dr. Reiff Brown, a board certified orthopaedic surgeon, at her lawyer's request. Dr. Brown rated claimant's impairment to her left shoulder (6 percent), left elbow (6 percent), left knee (21 percent) and her subsequent right knee complaints (2 percent).⁶ He went on to rate her cervical spine complaints, which he described as an aggravation of her preexisting degenerative changes, as a DRE II (5 percent), and a DRE II (5 percent) to the lumbar spine.⁷ Each of these ratings is, according to Dr. Brown, made pursuant to the 4th edition of the *Guides* and results in a total 31 percent permanent partial whole body disability. He also opined that claimant sustained a 57 percent task loss based upon the restrictions he imposed of avoiding work that involves frequent standing, frequent walking, frequent use of stairs and ladder, frequent use of the left hand above chest level and frequent reach away from the body more than 18 inches. He also recommended that she avoid flexion and extension of the left elbow, frequent flexion and extension of the cervical spine over 30 degrees, frequent flexion and extension of the lumbar spine more than 30 degrees⁸, and the task list provided by Dr. Barnett.⁹ As the ALJ noted, Dr. Brown did not have any of the medical records from the emergency room following the February 20, 2009 motor vehicle accident, nor had he reviewed claimant's subsequent treatment with Dr. Salone relative to her back complaints.

Respondent retained Dr. Paul Stein to examine claimant initially in February 2009. This first examination took place before claimant's motor vehicle accident and at that point, according to his records, claimant had no neck or lumbar complaints, although he had been advised she was receiving physical therapy for low back complaints. He ultimately

³ Salone Depo. at 45.

⁴ According to Dr. Salone, "impairment" is defined as the inability to perform." (*Id.* at 26).

⁵ *Id.* at 44,46.

⁶ Brown Depo. at 18-20.

⁷ Dr. Brown originally assigned a 5 percent to the lumbar spine but at oral argument, claimant's counsel advised that claimant was not pursuing any impairment for the low back in this claim.

⁸ Brown Depo. at 23-24.

⁹ *Id.* at 29.

rated her impairments as follows: left shoulder (2 percent) and left knee (2 percent). He assigned no permanent impairment to the left elbow. Suffice it to say, Dr. Stein had significant concerns about what he perceived as inconsistencies in claimant's presentation and what he perceived as symptom magnification. He believed that claimant's recitation of her initial injury, the mechanics of how she came to be hurt, were inconsistent.¹⁰

After her motor vehicle accident, claimant returned to see Dr. Stein on June 4, 2010. He conducted a second examination during which he perceived over-reacting on the claimant's part and inconsistency in her efforts and complaints. He ordered a number of tests, including a CT scan, all of which revealed normal results for a 52 year old woman. But he remained perplexed by claimant's rather bizarre reactions during her examination. At one point she complained of dizziness when the examination table was being slowly raised.¹¹ In fact, Dr. Stein was unable to conduct any sort of meaningful examination and ultimately suggested a psychological examination should be done. Respondent complied with that suggestion and after receiving that report, Dr. Stein stood firm on his opinions that claimant bore only a left upper extremity and lower extremity impairment, that she does not have any cervical impairment as a result of her work-related injury. He conceded that claimant demonstrated DRE II category symptoms (which would entitle her to a 5 percent to the cervical spine) but given her responses during the examination as well as her psychological examination, he believed those responses to be inherently unreliable. Thus, he was unwilling to assign any impairment to her cervical spine.

After considering the entire record, the SALJ adopted the findings expressed by Dr. Do and limited claimant's impairment findings to the scheduled injuries designated by Dr. Do. The SALJ concluded that "[t]here is insufficient evidence to establish claimant suffered injury to her back or neck as a result of a car accident on the way to physical therapy."¹² And because claimant's injuries were all scheduled, pursuant to K.S.A. 44-510d, claimant was not entitled to a work disability as provided by K.S.A. 44-510e(a).

The Board has considered the parties' arguments, the entire record as well as the findings and conclusions made by the SALJ and concludes the Award should be affirmed in its entirety. Simply put, the record as a whole reveals that it is not more probably true than not that claimant sustained permanent injury to her neck as a result of the February 20, 2009. Most importantly, claimant did not consistently complain of neck pain following her motor vehicle accident. It appears that she most certainly complained of problems to her neck when she initially appeared at the emergency room immediately after the accident. But when she saw Dr. Do a few weeks later, on March 5, 2009, he noted that she reported doing well with only intermittent aching of her right knee and some left hip

¹⁰ Stein Depo. at 14.

¹¹ *Id.* at 22.

¹² SALJ Award (Dec. 10, 2010) at 8.

complaints (which pre-dated the motor vehicle accident). According to Dr. Do's records, claimant made no mention of the automobile accident or any ongoing complaints attributable to that accident.

Claimant did go on to receive treatment from Dr. Salone, who diagnosed neck strain, but she did not feel claimant was left with any permanency as a result of that condition, although admittedly Dr. Salone uses an unorthodox method of rating permanency.

Perhaps the most disconcerting piece of evidence comes from Dr. Stein. In his June 2010 examination he found troubling and inconsistent responses to physical movements. When Dr. Stein attempted to elevate the examination table, claimant complained of dizziness. Dr. Stein noted he'd never seen that reaction in a patient, or in claimant for that matter, at any time before or since.¹³ And although claimant had no limp at that examination, her gait was very slow and she was unable to walk on her heels and toes. However, there was no finding of muscle weakness that would account for that particular difficulty. He also noted that claimant's range of motion and strength limitations were inconsistent, in that at times they were very limited but at other times during the examination, far less so. She was very tender to the touch and in Dr. Stein's view, overreacted to even the slightest touch. He concluded that if claimant's strength examination results were to be believed, she would not have been able to stand or walk.¹⁴ In sum, Dr. Stein concluded -

. . . At that point, I really stopped the physical examination. Any other measurements I would have made in my opinion would not have been reliable. I felt that this was a substantially invalid examination with a great deal of symptom magnification.¹⁵

Like the SALJ, the Board is unpersuaded that claimant sustained any permanent impairment to her neck as a result of her February 20, 2009 motor vehicle accident. She most certainly had neck complaints immediately after the accident and received conservative treatment for those complaints. But the greater weight of the evidence does not support claimant's contention that she sustained permanency as a result of that accident. Accordingly, the SALJ's Award is affirmed in its entirety.

¹³ Stein Depo. at 22.

¹⁴ *Id.* at 23.

¹⁵ *Id.*

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated December 10, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael J. Wyatt, Attorney for Claimant
Douglas D. Johnson, Attorney for Self-Insured Respondent
Jerry Shelor, Special Administrative Law Judge
Nelsonna Potts Barnes, Administrative Law Judge